

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Late Protest under the Sales and Use Tax Law of
Davinder Singh Pabla, et al

For Claimant:	Rattan Dhaliwal Attorney
For Sales and Use Tax Department:	Kevin Hanks Hearing Representative
For Appeals Division:	David H. Levine Tax Counsel IV

MEMORANDUM OPINION

This opinion addresses whether it is appropriate to consider a request for relief of the penalty imposed under Revenue and Taxation Code section 6565 for failing to pay the amount of a determination before it becomes final where the decision on the request for relief will be issued before the tax is paid. We conclude that it is appropriate to consider a request for relief of the finality penalty before the tax is paid, but that the penalty should not be relieved unless and until the tax due is paid within a stated period. We note that this issue arises only in the context of a late protest.

When a taxpayer does not file a petition for redetermination within 30 days after service of the Notice of Determination, the determined liability becomes final. (Rev. & Tax. Code, § 6561.) At that time, a ten percent late payment penalty, also known as the finality penalty, is imposed under section 6565. When, instead, a taxpayer files a timely petition for redetermination, the determined liability is not final until the appeal is resolved, meaning that the petitioner can wait to pay the determined amount until the appeal is resolved without incurring a finality penalty. Here, taxpayer did not file a timely petition for redetermination. Thus, the liability became final and the finality penalty was imposed. Further, the tax remained unpaid at the time the Appeals Division issued its Decision and Recommendation and at the time of the Board hearing.

Revenue and Taxation Code section 6592 authorizes this Board to grant relief of the finality penalty if it finds that the taxpayer's failure to make a timely payment is due to reasonable cause and circumstances beyond the taxpayer's control, and occurred notwithstanding the exercise of ordinary care and the absence of willful neglect. A taxpayer seeking relief under this provision must file a statement under penalty of perjury setting forth the facts upon which the taxpayer basis the claim for relief.

In its Decision and Recommendation in this case, the Appeals Division noted that taxpayer had requested relief of the finality penalty, but had not filed the required

statement under penalty of perjury. The Appeals Division stated that if taxpayer filed such a statement, the Appeals Division would consider the request. Taxpayer did so, but in the interim the Appeals Division concluded that the request was not yet ripe for consideration because the tax had not yet been paid, as explained by the Appeals Division in its Supplemental Decision and Recommendation:

“The policy of the Appeals Division has been (and remains) to request that taxpayers file requests for relief of penalty when a penalty for which relief can be granted under Revenue and Taxation Code section 6592 is before us on appeal, and if submitted, to consider whether such relief should be granted. We had also previously done so with respect to the finality penalty in late protests. We have since concluded that a request for relief of the finality penalty is not ripe unless and until the tax is actually paid in full. The actual payment of the tax due, and timing of that payment, is necessarily a factor in determining whether there is a reasonable basis for the late payment within the meaning of section 6562. Generally, once the tax is paid, the matter is ripe for consideration of whether the taxpayer had a reasonable basis for such late payment.¹

“This conclusion is also consistent with the basic policy underlying the imposition of the penalty, as well as the policy of offering relief under appropriate circumstances. This issue only comes before the Appeals Division in a late protest. There is no requirement that the Department accept a late protest into the appeals process, and if the Department does not do so, the taxpayer has no recourse except to pay the tax due and file a claim for refund. If the finality penalty were relieved in a late protest prior to the taxpayer’s actual payment of the tax and the Board later upholds the tax, there is no redetermination issued to the taxpayer which becomes final and due and payable 30 days later. (See Rev. & Tax. Code, § 6564.) Rather, the tax already became due and payable 30 days after the notice of determination. Thus, if the finality penalty is relieved before payment of the tax, there is no later event which would create another late payment penalty, and no further penalty would be imposed even if the taxpayer refuses to pay the tax due even after a fully completed, but unsuccessful, appeal.

“Accordingly, retaining the penalty until actual payment of the tax acts as an incentive for prompt payment[, for] example, after the Board

¹ The Department sometimes enters into installment payment agreements in which it agrees to relief of the finality penalty if the taxpayer makes all payments (of tax, interest, and other applicable penalties) in accordance with its provisions. When the taxpayer and the Department have entered into such an agreement, it would be inappropriate for the Appeals Division to recommend relief of the finality penalty before the taxpayer has complied with its installment payment agreement. For example, if the taxpayer had paid the tax due but had not completed payment of interest in accordance with the agreement, the Appeals Division would not entertain a request for relief of the finality penalty: if the taxpayer complies with the agreement, relief will follow, and if it does not comply with its promises in the agreement, relief would not be appropriate.

reaches its final decision and a statement of account reflecting the Board's decision is issued to the taxpayer. [Footnote omitted.] If prompt payment is not then forthcoming[,] the penalty will remain in effect to penalize the taxpayer for that failure, which is the purpose of the penalty.

“We note also that granting relief of the finality penalty to a taxpayer with a late protest before the tax is paid would put that taxpayer in a more favorable position than a taxpayer who filed a timely petition for redetermination. As noted above, if the finality penalty is eliminated during the appeals process prior to payment of the tax due, no additional late payment penalty will be imposed even if, for example, the taxpayer does not pay the tax due within 30 days after being notified of the Board's disposition of its late protest. The liability of the taxpayer filing a timely petition, however, is not final until after the appeal is completed and the Board issues a notice of redetermination. If the liability is not paid within 30 days, the finality penalty will be imposed. Thus, to avoid putting the taxpayer filing a timely petition for redetermination in a less favorable position than the taxpayer failing to do so, no relief can be granted for the finality penalty in a late protest if the tax has not been paid.”

OPINION

For the reasons explained by the Appeals Division quoted above, we agree that relief of the finality penalty should not be granted to a taxpayer prior to actual payment of the tax due. However, even if the tax remains unpaid, unless the taxpayer and the Department had entered into an installment agreement that already provides for relief of the finality penalty upon successful completion of the agreement, we conclude that the Appeals Division should *consider* a request for relief of the finality penalty, but that any relief recommended should be delayed until payment of the tax due and conditioned upon such payment within a stated period.

There are two major factors to consider when deciding whether to grant a request for relief of the finality penalty. One is the reason for the taxpayer's failure to timely pay the determination, and the other is the manner in which the taxpayer cures that failure by paying the tax due. At the time the Appeals Division issues its Decision and Recommendation, the taxpayer's failure to timely pay the determined tax has already occurred, meaning that all information bearing on that aspect of the request for relief should be available. However, for the situations considered herein, the taxpayer has not cured its failure to pay the tax due by the time the Decision and Recommendation is issued, and thus information regarding that aspect of the request for relief is not available at that time. Nevertheless, the Appeals Division should be able to determine whether a proper request for relief of the penalty, signed under penalty of perjury, should be granted *with conditions*.

The taxpayer must first convince the Appeals Division that there was a reasonable, non-negligent basis for the taxpayer's failure to timely pay the tax due.² If the taxpayer does so, the Appeals Division should then consider whether it is reasonable for the taxpayer to have withheld payment of tax until resolution of the late protest. That is, if the taxpayer has paid none of the determined tax, the Appeals Division should consider whether the taxpayer has a reasonable basis for having paid none of the tax, such as having disputed the entire determination and having a good faith belief (or at least a good faith hope) that its appeal will result in total elimination of the deficiency. If the taxpayer has conceded a portion of the determined liability, the Appeals Division should consider whether the taxpayer has paid all of that undisputed tax,³ and whether the taxpayer has a good faith belief that it will prevail as to any tax that remains unpaid.

If the Appeals Division reaches an affirmative answer to both of these issues, then it should recommend relief of the finality penalty, but should do so conditioned on the taxpayer's paying all remaining tax due within a specific number of days, not to exceed 30, after the mailing of notice of final decision in the appeal.⁴ This way, the penalty will remain in effect unless and until the tax is paid within the period specified, and will not be relieved until the condition specified (timely payment after notice of decision) is satisfied. If the tax is paid within the period recommended by the Appeals Division (and approved by the Board, where applicable), the penalty will be relieved *at that time*. If the tax is not paid within that period, the penalty will remain in place and will not be relieved.

We will apply the same principles explained above when we consider a request for relief of the finality penalty, for example, where the Appeals Division has recommended no relief and the taxpayer disputes that recommendation at a Board hearing. This is such a case: taxpayers have requested relief of the finality penalty and the Appeals Division did not recommend relief. We therefore address the specific facts of this case.

In taxpayers' statement under penalty of perjury requesting relief, they contend that the determinations were sent to the wrong address after the correct address had been given to the Board. The facts, however, indicate that the notice was properly served.

² This issue may be tied together with the reason the taxpayer failed to file a timely petition for redetermination since having done so would have prevented the liability from having gone final.

³ It would generally not be regarded as reasonable for a taxpayer who concedes a portion of the determination to withhold *any* payment of the determined liability pending resolution of the late protest, and to fail to pay even the conceded portion of the liability.

⁴ Paying the tax within 30 days of the notice of final decision (e.g., if there is a Board decision, 30 days from the date of the statement of account that includes notice of the Board's decision) places the taxpayer with a late protest on essentially the same basis as a taxpayer filing a timely petition for redetermination, on whom the finality penalty will be imposed if the determined tax is not paid within 30 days of the notice of redetermination. As noted previously, the person filing a late protest should not be placed on a more favorable basis than a person filing a timely petition for redetermination. We note, however, that there may be circumstances where the Appeals Division concludes that relief of the finality penalty should be conditioned on the taxpayer's payment of the tax due within some period less than 30 days.

In addition to the notices sent by the Department to the address in the Board's records that taxpayers contend was outdated, the Department also issued a notice to the partnership addressed to the business address of the restaurant. That notice was not returned to the Board, and we understand that petitioner still operates the restaurant at that location. We therefore conclude that the partnership notice was sent to the correct address for the partnership and was actually received by the partnership. This means that each partner was also properly served (service on the partnership is service on each partner), which means in turn that the finality penalty was properly imposed.

Since the request for relief in this case is based on the manner of service and the evidence submitted establishes that service was valid, we find that taxpayer's statement does not provide a basis for relieving the penalty. We therefore conclude that relief should not be granted on this basis, which means that we need not consider whether it was reasonable for taxpayers to fail to pay the tax due until the late protest was resolved.

Adopted at Sacramento, California on September 1, 2005.

John Chiang _____, Chair

Claude Parrish _____, Member

Betty T. Yee _____, Acting Member

Bill Leonard _____, Member

Marcy Jo Mandel _____, Member*

*For Steve Westley, pursuant to Government Code section 7.9.